NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Huntington Ingalls Incorporated[1] ***and*** **International Association of Machinists and Aerospace Workers, AFL–CIO.** Case 05–CA–081306

October 3, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding.[2] Pursuant to a charge filed on May 18, 2012, the Acting General Counsel issued the complaint on May 31, 2012, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 05–RC–016292.[3] The Respondent filed an answer and an amended answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On June 19, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On June 21, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On August 14, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 100. The Respondent filed a petition for review and the Board filed a cross-application for enforcement of the order in the United States Court of Appeals for the Fourth Circuit. The court consolidated the case for oral argument and decision with *NLRB v. Enterprise Leasing Co. Southeast, LLC* (4th Cir. No. 12–1514).

On July 17, 2013, the court denied enforcement of the Board's order. *NLRB v. Enterprise Leasing Co. Southeast*, *LLC*, 722 F.3d 609, 660 (2013). At the time of the Board's order, three of the five members of the Board were serving pursuant to January 2012 appointments that had been challenged as constitutionally infirm. The court's denial of enforcement was based on its conclusion that the January 2012 appointments were invalid, and that the Board therefore lacked a quorum to act at the time that it issued the order. Id. at 612–613, 660. The Board filed a petition for rehearing for the limited purpose of requesting that the court's order be modified to include language explicitly remanding the case to the Board for further proceedings consistent with the court's decision. The petition was summarily denied.

The Board subsequently filed a petition for certiorari. After the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which held the January 2012 appointments invalid, the Court denied the Board's petition.

By letter dated August 14, 2014, the Executive Secretary notified the parties that, in view of the determination that the Board that had previously decided the case was not properly constituted, the Board would now "consider the case anew and . . . issue a decision and order resolving the complaint allegations." Thereafter, the Respondent filed a letter objecting to any further action by the Board, arguing that in the absence of a remand from the court the Board lacks jurisdiction over this case.

Respondent's Objection to Consideration of Motion for Summary Judgment

The threshold issue is whether, in light of the denial of enforcement, the Board may consider this case anew. The sole basis of the decision denying enforcement was the court's conclusion that the January 2012 appointments were invalid, and that the Board thus lacked a quorum when it issued its order. See 722 F.3d at 612–613, 660. The court's denial of enforcement was not based on the merits of the unfair labor practice findings; to the contrary, the court held that the Board's determination on the merits of the case was supported by substantial evidence. Id. at 631. The clear import of the court's decision, along with the Supreme Court's *Noel Canning* decision, is that no validly constituted Board has ruled on the General Counsel's motion for summary judgment. The motion is therefore still pending before the Board, and the Board is free to address it.

This conclusion is consistent with the court's denial of the Board's petition for rehearing. In the petition, the Board stated its view that the court's decision clearly contemplated the possibility of further proceedings before a validly constituted Board:

> The Court's denial of enforcement is not based on the merits of the Board's unfair labor practice determinations, but *solely* on the Court's determination that the recess appointments to the Board were unconstitution-

[1] In accord with the Respondent's answer to the complaint and the Acting General Counsel's motion, the case caption has been changed to reflect the correct name of the Respondent.

[2] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] The Board's Decision on Review and Order in the representation proceeding issued under the name *Northrop Grumman Shipbuilding, Inc*., 357 NLRB No. 163 (2011). Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).

> al, and that the Board orders, issued without a Board quorum, therefore "must be vacated." [722 F.3d at 660.] Accordingly, it follows that the Court's decision is to be read as anticipating the possibility of issuance of new Board orders.

Petition for Rehearing at 3–4, *NLRB v. Enterprise Leasing Co. Southeast, LLC*, supra (No. 12–1514) (emphasis in original). Notwithstanding this understanding of the meaning of the denial of enforcement for further proceedings before the Board, the Board requested the inclusion of explicit remand language, in order to avoid the possibility of needless litigation concerning the issue. Because the petition was denied without explanation, no inference can be drawn that the denial was inconsistent with the clear import of the order denying enforcement.[4]

Finally, consideration of the motion at this time is consistent with the treatment in the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time the original decision was issued, and the Board then considered the case again and issued a new decision. The issue was presented squarely in *NLRB v. Whitesell Corp.,* 638 F.3d 883 (8th Cir. 2011). The court had denied enforcement of the Board's original order because the Board had lacked a quorum under *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010),[5] and the Board issued a new decision and order. The court enforced the new order, rejecting the respondent's argument that the Board lacked jurisdiction to redecide the case:

> In the prior action, the only question presented was whether to enforce the NLRB's order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. See 29 U.S.C. § 160(e).
>
> We have yet to determine whether Whitesell violated the NLRA. Our prior denial does not preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision. . . . The Board properly read our denial of the application for enforcement as based solely on the *New Process* decision. We now address the merits of the Board's decision for the first time.

638 F.3d at 889. Similarly, in *NLRB v. Domsey Trading Corp.,* 636 F.3d 33 (2d Cir. 2011), the court addressed the merits of a Board decision readdressing a case in which it had denied enforcement of a prior decision based on *New Process Steel.* See *NLRB v. Domsey Trading Corp.,* 383 F.Appx. 46 (2d Cir. 2010); *NLRB v. Domsey Trading Corp.,* 636 F.3d at 34 fn. 1.[6] Accordingly, we proceed to consider the General Counsel's motion.[7]

Motion for Summary Judgment

The Respondent denies its refusal to bargain, and contests the validity of the certification based on its objections to the election and the Board's unit determination in the representation proceeding.[8] The Respondent fur-

[4] See, e.g., *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) (motion for clarification); *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621–622 (11th Cir. 1991) (petition for rehearing en banc). Member Johnson did not participate in the prior representation case and concurs with the result in this proceeding, without needing to rely on the Board's view stated in its petition, above. Here, the Court indicated in its original opinion on review that the sole reason for declining to enforce the order was based on the invalid composition of the Board at that time; the Court did not give any explanation for its subsequent denial of the petition for rehearing that was filed by a constitutionally valid Board; and the Respondent has admittedly refused to bargain while not raising any representation issues that are properly litigable in an unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Given those circumstances, Member Johnson concurs here.

[5] *NLRB v. Whitesell Corp.,* 385 F.Appx. 613 (8th Cir. 2010). As in the instant case, the court had also summarily denied a postdecisional motion by the Board for remand or clarification. 638 F.3d at 888.

[6] See also *NLRB v. Whitesell Corp.,* 638 F.3d at 889 (While "the *Domsey Trading* court declined the invitation to clarify its denial decision," it "anticipated further proceedings before the NLRB" and, after "the case was reconsidered by the Board, . . . addressed the merits of the Board's decision.")

[7] *NLRB v. Lundy Packing Co.,* 81 F.3d 25 (4th Cir. 1996), relied on by the Respondent in opposing consideration of the General Counsel's motion, is inapposite. In that case, the court had denied enforcement of a prior Board order in the case, on the merits. Here, decisively, the court's denial of enforcement of the prior order was not a final judgment on the merits of the case. See *Whitesell,* 638 F.3d at 889.

[8] The Respondent's answer denies the complaint allegations that the unit is appropriate; that the Union was certified as the exclusive collective-bargaining representative of the unit; that it has refused to bargain with the Union as the exclusive collective-bargaining representative of a properly constituted unit; that its conduct violates the Act; and that its conduct affects commerce within the meaning of the Act. However, the issues regarding the appropriateness of the unit and the Union's certification were litigated and resolved in the underlying representation proceeding at a time when the Board had a quorum. In addition, the Acting General Counsel attached to his motion as Exh. 10 a letter dated May 8, 2012, from the Respondent to the Union, "respectfully declin[ing] your invitation to bargain." The Respondent does not contest the authenticity of this letter. Accordingly, the Respondent's denials with respect to these complaint allegations do not raise any litigable issues in this proceeding.

The Respondent also argues that the then Acting General Counsel could not properly be appointed under the Federal Vacancies Reform Act (Vacancies Act) and therefore lacked authority to issue the complaint in this case. In support of this argument, the Respondent asserts that the Vacancies Act does not apply to the office of General Counsel because there is a specific procedure under the National Labor Relations Act for filling the vacancy. Contrary to the Respondent's assertion, the express terms of the Vacancies Act make it applicable to all

ther contends that the Board abused its discretion in the underlying representation proceeding by applying the standard announced in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), which it also argues was wrongly decided. This is an argument that the Respondent could have raised on a motion for reconsideration of the Board's underlying decision. See, e.g., *Randell Warehouse of Arizona, Inc.,* 330 NLRB 914, 914 fn. 1 (2000), enf. denied on other grounds 252 F. 3d 445 (D.C. Cir. 2001). Hence, we regard this contention as untimely raised.

In any event, we find no merit in this contention. As explained in the underlying representation decision, the Board recognizes a presumption in favor of the retroactivity of new rulings in representation cases. 357 NLRB No. 163, slip op. at 3, fn. 8. We see no circumstances in this case that would overcome that presumption. Further, we see no prejudice to the Respondent. We note that in the underlying decision, the Board addressed the Respondent's arguments regarding the appropriateness of the petitioned-for unit and reached the same conclusion under the cases the Respondent relied on as it did applying *Specialty Healthcare*. Id. Therefore, the Respondent cannot reasonably argue that it was denied due process.[9]

Consequently, all representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Virginia corporation,[10] with its principal office and place of business in Newport News, Virginia, has been engaged in constructing, overhauling, and refueling nuclear-powered submarines and aircraft carriers for the United States Navy. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, has provided construction, overhaul, and nuclear core refueling services valued in excess of $50,000 directly to the United States Navy, Department of Defense.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Association of Machinists and Aerospace Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held June 25, 2009, the Union was certified on February 24, 2012, as

executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 ("Executive agency" defined to include independent agencies), and to all offices within those agencies, such as the office of General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a). The Respondent's assertion is also contrary to, indeed the converse of, section 3347 of the Vacancies Act, which makes the Vacancies Act the exclusive means for designating an acting official for a covered position except when another statutory provision, such as Sec. 3(d) of the NLRA, provides for such designation. In that event, the Vacancies Act provides a valid "alternative procedure." S. Rep. No. 105–250, at 17 (1998). Finally, the enforcement provision of the Vacancies Act, 5 U.S.C. § 3348, which deems an office "vacant" and actions taken by its occupant of "no force or effect" if it was temporarily filled in a manner inconsistent with the Vacancies Act, is expressly and specifically inapplicable to the office of the Board's General Counsel. 5 U.S.C. § 3348(e)(1). The Acting General Counsel was properly appointed under the Vacancies Act, and the complaint is not subject to attack based on the circumstances of his appointment. See *Muffley v. Massey Energy Co.,* 547 F. Supp. 2d 536, 542–543 (S.D.W. Va. 2008), affd 570 F.3d 534 (4th Cir. 2009) (upholding authorization of a 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act).

[9] We also reject the Respondent's argument that the Board further abused its discretion by using the adjudicative process to create a new, generally applicable standard for determining appropriate bargaining units. As the Board earlier noted, it "has for 75 years developed the meaning of the statutory term 'an appropriate unit' through adjudication. . . . The Supreme Court has approved the Board's use of adjudication in addressing the broad range of issues arising under the Act." *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56, slip op. at 3 (2010) (internal footnotes omitted). We further reject the Respondent's argument that the Board's underlying decision contravenes Sec. 9(b) or (c)(5).

Member Johnson notes that the Board in the underlying representation case, *Northrop Grumman Shipbuilding, Inc.,* 357 NLRB No. 163 (2011), applied the unit determination standard articulated in *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011). Member Johnson did not participate in *Northrop Grumman* and, because he agrees that the Respondent has not raised any representation issue that is properly litigable in this proceeding, finds no need here to express his opinion whether that case or *Specialty Healthcare* were correctly decided.

[10] The Respondent's answer and the Acting General Counsel's motion indicate that the complaint incorrectly states that the Respondent is a Delaware corporation rather than a Virginia corporation. We correct this error.

the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time radiological control technicians, radiological control technician trainees, laboratory technicians, and calibration technicians employed in Department E85 at the Respondent's facility in Newport News, Virginia; but excluding all other employees, all office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated April 14, 2012, the Union requested that the Respondent recognize it and engage in collective bargaining and, since May 8, 2012, the Respondent has refused to do so. We find that the Respondent's failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing, since May 8, 2012, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody that understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Huntington Ingalls Incorporated, Newport News, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time radiological control technicians, radiological control technician trainees, laboratory technicians, and calibration technicians employed in Department E85 at the Respondent's facility in Newport News, Virginia; but excluding all other employees, all office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Newport News, Virginia, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all cur-

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rent employees and former employees employed by the Respondent at any time since May 8, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 3, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time radiological control technicians, radiological control technician trainees, laboratory technicians, and calibration technicians employed in Department E85 at our facility in Newport News, Virginia; but excluding all other employees, all office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

HUNTINGTON INGALLS INCORPORATED

The Board's decision can be found at www.nlrb.gov/case/05–CA–081306 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.